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7                   UNITED STATES DISTRICT COURT  
8                   WESTERN DISTRICT OF WASHINGTON  
9                   AT SEATTLE

10                  JOHNNY B. DELASHAW, JR.,

11                  CASE NO. C18-0537JLR

12                  Plaintiff,

13                  v.  
14                  ORDER ON SEATTLE TIMES'  
15                  SEATTLE TIMES COMPANY, et  
16                  al.,  
17                  Defendants.

18                  Before the court is Defendant Seattle Times Company's ("Seattle Times" or "the  
19                  Times") motion for clarification (Mot. (Dkt. # 287)) of the court's order granting the  
20                  Seattle Times' second motion for summary judgment and granting in part and denying in  
21                  part Defendant Dr. Charles Cobbs's second motion for summary judgment (2d MSJ  
22                  Order (Dkt. # 285) (sealed)). Namely, the Times requests that the court clarify the  
burden of proof for the various elements of a defamation claim. (Mot. at 1.) In its order,  
the court noted that a plaintiff must establish each element of a defamation claim "by

1 convincing clarity.” (2d MSJ Order at 11 (citing *Mark v. Seattle Times*, 635 P.2d 1081,  
 2 1089 (1981)). The Times requests the court clarify that under Washington law “a  
 3 plaintiff in an action for defamation must prove actual malice by convincing clarity, and  
 4 the other elements by a preponderance of the evidence.” (Mot. at 1-3 (citing *Richmond v.*  
 5 *Thompson*, 922 P.2d 1343 (Wash. 1996); *Duc Tan v. Le*, 300 P.3d 356 (Wash. 2013).)

6 The Times’ proposed clarification, however, elides a distinction in the case law—  
 7 whether the plaintiff in the defamation case is a private or public figure. In both  
 8 *Richmond* and *Duc Tan*, the Court analyzed defamation claims brought by public figures.  
 9 (See *Richmond*, 922 P.2d at 1348 (“Both parties agree Trooper Richmond is a public  
 10 official under *New York Times*.); *Duc Tan*, 300 P.3d at 358, 366 (finding that “[t]he trial  
 11 judge determined that [plaintiffs] were public figures” and “[a] public figure defamation  
 12 plaintiff must prove with clear and convincing evidence that the defendant made the  
 13 statements with ‘actual malice.’”)) In *Mohr v. Grant*, however, the Washington Supreme  
 14 Court recognized that “[c]ase law is unclear as to whether a private plaintiff facing a  
 15 defense motion for summary judgment must make a *prima facie* showing of all of the  
 16 elements of defamation with convincing clarity or by a preponderance of the evidence.”  
 17 *Mohr v. Grant*, 108 P.3d 768, 773 n.7 (Wash. 2005) (comparing *Richmond* and *Mark* but  
 18 declining to resolve the ambiguity).

19 The court finds that a clarification is appropriate on this point. But in light of the  
 20 explicit statement of ambiguity on the burden of proof from the Court in *Mohr* and the  
 21 apparent absence of clarification since, the court does not find it proper to adopt the  
 22 blanket statement proposed by the Times. To ensure no further confusion, the court will

1 issue an amended order pursuant to Federal Rule of Civil Procedure 60(a). Rule 60(a)  
2 permits the court to “correct a clerical mistake . . . arising from oversight . . . whenever  
3 one is found in a[n] . . . order.” Fed. R. Civ. P. 60(a). Further, “[t]he court may do so . . .  
4 on its own, with or without notice.” *Id.* As relevant here, Rule 60(a) “allows a court to  
5 clarify a judgment in order to . . . reflect the necessary implications of the original order,  
6 [or] to ensure that the court’s purpose is fully implemented.” *Tattersalls, Ltd. v.*  
7 *DeHaven*, 745 F.3d 1294, 1298 (9th Cir. 2014) (citing *Garamendi v. Henin*, 683 F.3d  
8 1069, 1079 (9th Cir. 2012)). Clarifications pursuant to Rule 60(a) are appropriate so long  
9 as the clarifications do not change an order’s “operative, substantive terms,” and are  
10 instead done to maintain “fidelity to the intent behind the original judgment.” *See*  
11 *Garamendi*, 683 F.3d at 1078-80.

12 To correct its clerical mistake, the court will amend the sentence beginning at page  
13 11, line 2 and ending at page 11, line 13 of the court’s November 18, 2020 summary  
14 judgment order from:

15 A plaintiff must establish each element “by evidence of convincing clarity.”  
16 *Mark*, 635 P.2d at 1089.

17 to:

18 In a defamation action brought by a public figure, a plaintiff “must prove  
19 with clear and convincing evidence that the defendant made the statements  
with ‘actual malice’” and prove the remaining elements by a preponderance  
of the evidence. *See Duc Tan*, 300 P.3d at 366, 366 n.5.

20 The court will also insert a footnote following the above sentence which reads:

21 The Washington Supreme Court has recognized that “[c]ase law is unclear  
22 as to whether a private plaintiff facing a defense motion for summary  
judgment must make a *prima facie* showing of all of the elements of

1      defamation with convincing clarity or by a preponderance of the evidence.”  
2      *Mohr v. Grant*, 108 P.3d 768, 773 n.7 (Wash. 2005). The court finds that it  
3      need not attempt to resolve this ambiguity in this order. To the extent Dr.  
4      Delashaw has failed to make a *prima facie* showing of any elements of his  
5      defamation claims, he has failed to do so under what is required by a  
6      preponderance of the evidence standard at this stage in the proceedings. To  
7      the extent he has made a *prima facie* showing, he has done so under what is  
8      required by a convincing clarity standard.

9      The court ordered counsel to submit additional filings and proposed redactions in its  
10     original order. (*See* 2d MSJ at 34-35.) The court will also insert footnotes in its amended  
11     order clarifying that the parties have complied with these directions from the court.  
12     These amendments maintain fidelity to the intent behind the court’s original order. *See*  
13     *Garamendi*, 683 F.3d at 1078-80. No other amendments to the order are necessary.

14     Dated this 11th day of December, 2020.

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17     JAMES L. ROBART  
18     United States District Judge